

**TESS C. HANNA**

VS.

## Respondents

## Insurance Carriers

## ORDER

## ISSUES

- (1) The date of accident or dates of accidents.
- (2) Whether claimant sustained an accidental injury and/or a series of accidental injuries which arose out of and in the course of his employment.

- (3) Whether the Administrative Law Judge exceeded his jurisdiction by denying respondent's Motion to Quash Notice of Preliminary Hearing and holding a second preliminary hearing while the first was on appeal to the Board.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the entire record and considering the briefs of the parties, the Appeals Board finds as follows:

Claimant's Form E-1, Application for Hearing, alleged a series of accidents commencing November 6, 1996, and continuing up to and including February 22, 1997, the date claimant last worked. Claimant subsequently amended his claim to allege the series of accidents began on November 4, 1996. The Appeals Board finds two separate accidents. The first accident occurred on November 4, 1996. The second accident was a series which occurred each and every day claimant worked thereafter, ending February 22, 1997.

Claimant is an over-the-road tractor trailer truck driver. On November 4, 1996, he injured his low back when he slipped and fell while unloading a truck. Respondent M. Bruenger sent him to the Broadway Occupational Medicine Clinic where he was treated by Dr. Robert L. Wilson on the day following the accident. As a result of his examination of claimant on November 7, 1996, Dr. Wilson released claimant to return to work without restrictions effective November 8, 1996. Claimant returned to work and did not seek medical treatment again until February 22, 1997, when he reported to his family physician, Dr. David M. Netherton, with complaints of worsening back and leg pain together with pain in his chest and down his left arm. Claimant subsequently was treated by Dr. Tyrone D. Artz, an orthopedic surgeon in Wichita, Kansas.

Claimant also alleges personal injury by a series of accidents occurring each day worked after November 4, 1996. The medical records introduced at the April 24, 1997, and at the May 8, 1997, preliminary hearings indicate claimant suffered additional injury by accidents after November 4, 1996, as a result of his regular work activities. However, it is M. Bruenger and Business Insurance Company's position that if claimant's current complaints are work related, then they are a part of or a natural and probable consequence of his November 4, 1996, accident. Claimant agrees with this contention.

Claimant returned to work soon after the November 4, 1996, accident and continued to work until February 22, 1997, when he again sought medical treatment. He testified that during this period the amount of loading and unloading he was required to perform caused additional pain in his back. Also, driving caused him increased pain and discomfort. Nevertheless, although his symptoms progressively worsened, he was able to tolerate the pain until on or about February 21, 1997. At that time he was driving back from a trip to Seattle when he experienced shortness of breath, pain in his chest and pain down his left

arm. Claimant described these symptoms as a new problem in addition to the back and leg pain he had been experiencing ever since the November 4, 1996, accident. Dr. Netherton, his family doctor, determined claimant did not have a heart problem and referred him to Dr. Artz at the Kansas Orthopaedic Clinic. Claimant denied injuring himself at home between November 4, 1996, and February 22, 1997. Claimant described his overall condition as much worse after his trip to Seattle from what it had been prior to his trip to Seattle.

The Kansas Court of Appeals in Berry v. Boeing Military Airplanes, 20 Kan. App. 2d 220, 885 P.2d 1261 (1994) held:

The date of accident or date of occurrence in a workers compensation action involving carpal tunnel syndrome is the last day on which a claimant performs services for his or her employer and is required to stop working as a direct result of the claimant's pain and disability resulting from carpal tunnel syndrome. (Syl. ¶ 3)

In Condon v. Boeing Co., 21 Kan. App. 2d 580, 903 P.2d 775 (1995), the Kansas Court of Appeals expanded its holding in Berry to include other micro-trauma injuries of the type caused by continuing, repetitive activity over a period of time. The Court held that because it is impossible to determine exactly when the injury or injuries have occurred "and because such injuries occur over a period of time, this type of condition is virtually the same for workers compensation purposes as carpal tunnel syndrome."

The Appeals Board finds, based upon claimant's uncontradicted testimony, that he did suffer an aggravation of his preexisting back condition each and every day worked following his return to work with respondent after his November 4, 1996, slip-and-fall accident. For purposes of preliminary hearing, claimant has established personal injury by accident arising out of and in the course of his employment with M. Bruenger by a series ending on or about February 22, 1997. Therefore, following the rule announced in Berry and Condon, the claimant's date of accident for the series of micro-trauma injuries is his last day worked.

Finally, it was M. Bruenger and New Hampshire Insurance Company's contention before the Administrative Law Judge and it is argued to the Appeals Board that the Administrative Law Judge did not have jurisdiction over the claim after the appeal was taken from the April 24, 1997, preliminary hearing Order and while such appeal was pending before the Board. The Appeals Board disagrees. There is no limit to the number of preliminary hearings that may be conducted, nor does the pendency of an appeal divest the Administrative Law Judge from jurisdiction to hear a request for preliminary benefits under K.S.A. 1996 Supp. 44-534a. See also K.S.A. 44-523.

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the claimant's appeal from the April 24, 1997, Order denying compensation was made moot by the Administrative Law Judge's subsequent preliminary hearing Order of May 8, 1997, granting compensation; the Administrative Law Judge did not exceed his jurisdiction in denying respondent M. Bruenger and New Hampshire Insurance Company's Motion to Quash Notice of Preliminary Hearing; and, that the Order dated May 8, 1997, is modified to find a work-related accident occurred on November 4, 1996, followed by a series of accidents each and every day worked beginning November 8, 1996, and ending on February 22, 1997.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of December 1997.

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BOARD MEMBER

c: Dennis L. Phelps, Wichita, KS  
Kim R. Martens, Wichita, KS  
Ronald J. Laskowski, Topeka, KS  
Laura Thompson, Overland Park, KS  
Jon L. Frobish, Administrative Law Judge  
Philip S. Harness, Director